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No. 95-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,
v.
WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a railroad car on which the drawbar is so misaligned as to prevent automatic coupling violates Section 2 of the Safety Appliance Acts (49 U.S.C. § 20302(a)(1)(A)).

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BRIEF FOR RESPONDENT

FACTS AND BACKGROUND

The salient facts in this case are unrefuted. In its opening statement, the railroad conceded that the Respondent and his co-worker had to go between the cars in an attempt to line up the drawbars so that the cars could be coupled together (J.A. 12).[1] The particular car in question couldn't couple unless they "slued the drawbar over and straightened it out." (J.A. 14). The Respondent was attempting to pull the drawbar, while his co-worker was pushing on it. (J.A. 17-18). Both persons were between the rails and the cars (J.A. 16-18). The railroad conceded that manual alignment of a drawbar requires an

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[1] The drawbar is a heavy bar located at the ends of rail cars to which the cars couple and uncouple. The end of the drawbar is known as a knuckle which consists of a clamp mechanism that opens and closes to allow the coupling to occur.

employee to go between the cars to straighten it out. (Pet. Br. 3).[2]

Railroad cars attach to each other through a coupling mechanism which is located at either end of each car. The coupling mechanism consists of a drawbar and a knuckle that connects with an adjacent car. A pin inside the coupler knuckle locks the knuckle in a closed position. The adoption of the Federal Safety Appliance Acts (hereinafter "SAA")[3] prompted the railroads to begin using devices such as pin lifters and uncoupling levers (which are operated from the side of a railroad car to open a knuckle for the purpose of separating railroad cars or preparing the cars for a coupling). Such devices assist in the opening of knuckles without the necessity of employees going between the railroad cars. In 1893, the time of passage of the SAA, these devices were not in widespread use. Using a pin lifter or uncoupling lever, the pin can be removed and the knuckle can be opened without having to step between the rails. If the couplers on both cars are set properly so that the drawbar, which rests on a pivot to allow the car to round curves without derailing, is aligned and at least one of the knuckles is open, the two cars will connect automatically upon impact.

Therefore, two things must occur to effect a coupling.[4] First, the knuckles (drawhead, or coupler) must be open;

[2] The Petitioner (Pet. Br. 6) suggests that the uncoupling of the car in question "must have taken place on a curve where the drawbars would have remained misaligned when the car stopped." There is no direct evidence in the record that this in fact occurred. For purposes of the SAA, it doesn't matter how the drawbar became misaligned.

[3] The SAA were originally codified at 45 U.S.C. §§ 1-16. Section 2 is currently codified at 49 U.S.C. § 20302(a)(1)(A). Wherever § 2 of the SAA is cited in this Brief, it refers to § 2 of the Act of March 2, 1993, codified at 45 U.S.C. § 2 as originally enacted, and as codified in 1994.

[4] It has been argued that Section 2 of the SAA only mandates that cars be *uncoupled* without the necessity of persons going between the ends of the cars. However, the Court has long held that the language also applies to *coupling*. *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 18-19 (1904).

and, secondly, both drawbars must be positioned in line with each other.

It is undisputed that, when a drawbar moves far out of alignment, this precludes automatic coupling and then it becomes necessary for the employee to go between the cars to adjust the drawbar. That is precisely what happened in this case. Technology exists, but the railroad industry has not adopted an automatic realignment device as part of the coupling equipment. As pointed out in the Association of American Railroads' *amicus* brief at 10-11, in the 1960's the railroad industry began using an automatic realignment device which was not completely successful. However, there is no indication that the industry attempted to improve it any further. The freight railroads created this overall problem because of the changes in the type of equipment being used today. When the SAA was enacted, the length of box cars was 40 feet. These relatively short cars did not develop problems of misaligned drawbars because the cars could easily traverse a curve with little or no play in the drawbar. However, with the increases in car lengths to approximately 90 feet, this necessitated the use of longer drawbars. The use of longer drawbars has, in turn, resulted in misalignment to occur in some situations. However, the industry has not taken any effective actions to eliminate the hazard created by the use of the longer cars in coupling operations. It should be noted that the hazard does not exist in passenger service because couplers on many passenger cars are equipped with devices which automatically center the drawbar, and the drawbars on such cars are significantly shorter.

The safety issues facing Congress at the time of the adoption of the SAA were not that the predominantly used link and pin type coupler was defective, nor that

the intermingling of the various types of couplers were dangerous because they were defective. Rather, their continued use in railroad operations created an unsafe condition that needed to be corrected. Congress intended to eliminate the dangers attendant to working between cars, and it didn't matter whether or not the equipment was defective. These dangers are what Congress addressed, not the type of equipment used to accomplish the mandate. If a railroad fails to place the safety equipment on the cars to carry out this goal, then it is liable under the SAA.

How does the Court best carry out Congress' intent to protect the worker who is required to go between rail cars to effect a coupling? It should not restrict the reading of the statute in such a way that loophole will exists for carriers to avoid liability to an injured employee who was performing his/her work as required by the railroad.

SUMMARY OF ARGUMENT

A. The SAA Is Violated If A Misaligned Drawbar Requires Manual Adjustment And It Is Necessary To Place One's Body Between The Ends Of Cars In Order To Make Such Adjustment

Throughout the trial, the Petitioner attempted to establish that the misalignment of the drawbar was not caused by a defect in the equipment (See Pet. Br. 7). The words of Section 2 of the SAA do not state that the coupler must be defective in order for there to be a violation. This conclusion was reached by the Court in *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 99 (1949). If the couplers do not couple automatically by impact (for whatever reason, whether defective or not), or cannot be uncoupled without the necessity of employees going between the ends of cars, then Section 2 of the SAA is violated.

Section 2 of the SAA imposes certain absolute duties upon railroads to outfit their cars with safe equipment.

> "[A] failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence."

O'Donnell v. Elgin J. & E. Ry. Co., 338 U.S. 384, 390 (1949).

The Court has enunciated two ways in which a plaintiff can establish the railroad's liability for an accident involving a coupling mechanism. The first is to provide evidence that two cars failed to couple automatically upon impact. In *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S., at 98, the Court held that the plaintiff could meet his burden under § 2 by showing a failure to couple automatically upon impact. The railroad's duty to have couplers which couple automatically upon impact "is an absolute one requiring performance 'on the occasion in question.'" *Id.* The plaintiff is not, therefore, required "to show a 'bad condition' of the coupler." *Id.* at 99. Failure of the equipment itself is sufficient for liability, and there is no need, in addition, to establish a defect. The second method of establishing a violation of the SAA is to show a defect in the coupling equipment. Although a plaintiff is not required to prove that the equipment was defective, see *Affolder*, the evidence that an employee is required to step between the cars because of defective equipment can establish liability.

The Court has allowed only one exception to the above requirements. It involves a situation where the employee does not ensure that the coupler was in the open position before impact. In *Affolder*, the Court stated that liability under § 2 "assumes that the coupler was placed in a position to operate on impact." *Id.* at 96. The coupling, which may be accomplished without a person going be-

tween cars, should not be extended to require alignment of the drawbar (which cannot be performed without a person going completely between the cars) as a pre-condition to a violation of § 2.

B. The Legislative History Supports The Statutory Provision That It Is Not Necessary To Prove A Defect For A Violation Of The SAA.

The Court stresses the importance of statutory policy. See *Bruce Babbitt, et al. v. Sweet Home Chapter of Communities For a Great Oregon, et al.*, 63 U.S.L.W. 4665, 4668 (U.S. June 27, 1995). The Court has made it clear that the prime purpose of the SAA is the protection of employees from injury or death. See *B. & O. R.R. v. Jackson*, 353 U.S. 325 (1957); *Gentle v. Western & A. R.R.*, 305 U.S. 654 (1939). The object of the SAA, being remedial and humanitarian, should not be construed as to defeat the above purpose. This certainly would result if the Petitioner's views were adopted.

Throughout the entire deliberations by Congress on the SAA, its focus was solely on uniformity of the couplers, and the dangerous increase in injuries, if they were not automatically uncoupled and coupled. There was absolutely no suggestion that there be an additional condition imposed to first establish a defect before a violation can occur. See e.g., *Automatic Couplers and Power Brakes: Hearings Before the Senate Committee on Interstate Comcerce on S. 811, S. 893 and S. 1618*, 52nd. Cong. 1st Sess.; S. Rep. No. 1049 (1892).

The legislative history fortifies the statutory provision that it is not necessary to prove a defect for a violation of Section 2 of the SAA to occur. Congress, in the automatic coupler provision, wanted one result—to obviate the necessity of persons going between cars for coupling and uncoupling. H.R. Rep. 1678, 52nd Cong. 1st Sess. 3 (1892). There is not one word in the hearings, the Congressional reports, nor the Congressional floor debate

to the effect that the coupler must be defective before a violation exists.

The spokesperson for the railroad industry at the Congressional hearings in 1892, Mr. H.S. Haines, Vice-president of the American Railway Association (predecesor to the Association of American Railroads) stated the problem succinctly:

> It is not a question as to whether we should have a uniform coupler or not. The question is whether we shall have that kind of a coupler which will protect men's lives and protect them from personal injury, and that is the yardstick that is to be applied to all proposed legislation.

S. Rep. No. 1049, 52nd Cong. 1st Sess. 40 (1892).

Mr. H. S. Haines further testified:

> What the man who manipulates the coupler wants is that every coupler . . . shall have what we call the release rod, that controls the locking device, so arranged that he can stand *outside* of that car and operate it.

Id. at 41. (Emphasis Added).

The Senate floor debate adds further clarification:

> This bill does not require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between the cars.

24 Cong. Rec. 1280 (1893).

In *United Transportation Union v. Lewis*, 711 F2d 233, 236 fn. 6 (D.C. Cir. 1983), the panel, in which Justice Ginsburg was a member, analyzed the legislative history and stated that:

> While an action [would lie] for any injuries sustained in performing the manual preparation, because cars have failed to couple automatically, . . . this does not make the coupler "defective" within the meaning of FRA regulations. . .

In that case the court recognized that an FRA regulation may not be violated, but an action could still lie for injuries sustained in performing the manual preparation because the cars failed to couple automatically. *Id.* at 236 fn. 6. Therefore, as reasoned in *Lewis*, a violation of the SAA does not necessarily mean that a FRA regulation issued pursuant to the SAA is violated. Also, the court said that, although there is no separate prohibition for the act of going between the cars, the railroad is still liable because if the employee must go between the cars to effect a coupling, then "there has been a failure to provide equipment that functions as the statute commands." *Id.* at 251.

C. This Court's Analysis Of The SAA Confirms That It Is Not Necessary To Prove A Defect Exists In The Coupler To Establish A Violation

The Court has reviewed § 2 of the SAA a limited number of times. In each case it upheld the basic purpose of the Act, to protect an employee from having to go between cars to assist in coupling or uncoupling. As stated by this Court on several occasions, the *condition* of the equipment is not the issue. Rather, it is whether the couplers *performed* as required by the SAA.

The two concepts which emerge from the Court's analysis of § 2 of the SAA are:

1. If the equipment failed to perform as required by the statute, this in and of itself is an actionable wrong.
2. Section 2 mandates that the couplers *perform* as required, and the *condition* of the coupler is irrelevant in determining whether a violation has occurred. Any requirement that a coupler must be properly set as a precondition to liability recognizes that such an act can be accomplished outside the cars without the necessity of a person going between them.

In *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. at 99, the Court held that if a car failed to perform properly in a switching operation, this was a violation of the Act. The only way a carrier could avoid liability is if the coupler had not been properly opened. *Id.* The Court pointed out that the plaintiff did not have to show a bad condition of the coupler. *Id.* at 98.

In *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430, 433-434 (1949), the Court held that the absence of a defect cannot aid the railroad if the coupler was properly set and failed to couple. In *O'Donnell*, 338 U.S. at 393, the Court said that evidence of defect added nothing to a claim under SAA, because it was the failure of the equipment to perform as Congress mandated which was violative of the Act.

The Petitioner argues that it need not develop technology to align drawbars automatically (Pet. Br. 22-23). The Court in *O'Donnell* answered this issue and said:

> A defendant cannot escape liability for a coupler's inadequacy by showing that too much was demanded of it, nor by showing that while the coupler broke it had been properly manufactured, diligently inspected and showed no visible defect. These circumstances do go to the question of negligence; but, even if a railroad should explain away its negligence, that is not enough to explain away its liability if it has violated the Act.

338 U.S. at 393-394.

In addition to *O'Donnell*, the Court in both *Carter* and *Affolder* eliminated all requirements of negligence or fault in establishing a violation of the SAA. These cases recognize that negligence would be improperly introduced into the cases if the railroad could defend against a violation of the SAA by evidence of alleged reasons why the coupling would not occur in a particular set of circumstances.

ARGUMENT

I. THE SAA IS VIOLATED IF A MISALIGNED DRAWBAR REQUIRES MANUAL ADJUSTMENT AND IT IS NECESSARY TO PLACE ONE'S BODY BETWEEN THE ENDS OF CARS IN ORDER TO MAKE SUCH ADJUSTMENT

Throughout the trial, the Petitioner attempted to establish that the misalignment of the drawbar was not caused by a defect in the equipment (See Pet. Br. 7). The words of Section 2 of the SAA do not state that the coupler must be defective in order for there to be a violation. This conclusion was reached by the Court in *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. at 99. If the couplers do not couple automatically by impact (for whatever reason, whether defective or not), or cannot be uncoupled without the necessity of employees going between the ends of cars, then Section 2 of the SAA is violated.

Each case cited by the Petitioner in its brief at p. 17 in support of its position, that a violation of the Safety Appliance Acts results from the unlawful use of defective equipment, is distinguishable. The straightforward response to those cases is that neither one involved § 2 of the SAA. Also, in neither case did the Court state that proof of a defect was a condition precedent to establishing liability. See *Myers v. Reading Co.*, 331 U.S. 469, 482-483 (1947) where the Court said that a non efficient hand brake may be shown either by proving that (1) a defect exists, or (2) failure of the equipment to function as intended. Clearly, it is permissible for a Plaintiff to show a defect in proving a violation of Section 2 of the SAA, but it does not follow that the Plaintiff is required to prove a defect in order to establish the violation. All that is necessary is that the equipment does not function as required by the law.

The railroad argues (Pet. Br. 11-13) that the statute does not apply in situations where the cars are stationary

and employees attempt to align drawbars before or after an attempted coupling occurs. It states that the Act is applicable only *during* the coupling and uncoupling, not preparatory thereto. The Court addressed this point in *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949). There, the railroad also argued that the power brake law was not designed to protect employees from *standing* trains. The Court stated that it did not agree with the lower court's holding that the object of the SAA was not to protect employees from standing but from moving trains. It said:

> We do not view the Act's purpose so narrowly. It commands railroads not to run trains with defective brakes.

Id. at 522

The SAA imposes certain absolute duties upon railroads to outfit their cars with safe equipment.

> [A] failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence.

O'Donnell v. Elgin J. & E. Ry. Co., 338 U.S. at 390. "Once the violation is established, only causal relation is an issue." *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434 (1949).

The Court has enunciated the way in which a plaintiff can establish the railroad's liability for an accident involving a coupling mechanism. In *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. at 98, the Court said that the plaintiff could meet his burden under § 2 by showing a failure to couple automatically upon impact. The railroad's duty to have couplers which couple automatically upon impact "is an absolute one requiring performance 'on the occasion in question.'" *Id.* The plaintiff is

not, therefore, required "to show a 'bad condition' of the coupler." *Id.* at 99. Failure of the equipment itself is sufficient for liability, and there is no need, in addition, to establish a defect. Although a plaintiff is not required to prove that the equipment was defective, see *Affolder*, the evidence that an employee is required to step in between the cars because of defective equipment can be a means to establish liability. In *San Antonio & Arkansas Pass Ry. Co. v. Wagner*, 241 U.S. 476, 483-84 (1916), "evidence of bad repair in the equipment" was sufficient to establish liability and thus, the Court stated, "[w]e need not in this case determine . . . that the failure of a coupler to work at any time sustains a charge that the Act has been violated."

The Court has allowed only one exception to the above requirements. It involves a situation where the employee does not ensure that the coupler was in the open position before impact. In *Affolder*, the Court stated that liability under § 2 "assumes that the coupler was placed in a position to operate on impact." 99 U.S. at 96. The open position of the coupler, which may be accomplished without a person going between cars, should not be extended to require alignment of the drawbar (which cannot be performed without a person going completely between the cars) as a pre-condition to a violation of § 2.

II. THE LEGISLATIVE HISTORY SUPPORTS THE STATUTORY PROVISION THAT IT IS NOT NECESSARY TO PROVE A DEFECT FOR A VIOLATION OF THE SAA

Throughout the entire deliberations by Congress on Section 2 of the SAA, its focus was solely on uniformity of the couplers, and the dangerous increase in injuries, if they were not automatically uncoupled and coupled. There was absolutely no suggestion that there be an additional condition imposed to establish a defect for a violation to occur. See *Automatic Couplers and Power Brakes: Hearings Before the Senate Committee on Inter-*

state Commerce on S. 811, S. 893 and S. 1618, 52nd Cong. 1st Sess.; S. Rep. No. 1049 (1892).[5]

The Court stresses the importance of statutory policy. See *Bruce Babbitt, et al. v. Sweet Home Chapter of Communities For A Great Oregon, et al.*, 63 U.S.L.W. 4665, 4668 (U.S. June 27, 1995). The Court has made it clear that the prime purpose of the SAA is the protection of employees from injury or death. See *B. & O. R.R. v. Jackson*, 353 U.S. 325 (1957); *Gentle v. Western & A. R.R.*, 305 U.S. 654 (1939). The SAA, being remedial and humanitarian, should not be construed as to defeat the above purpose. This certainly would result if the Petitioner's views were adopted.[6]

The legislative history fortifies the statutory provision that it is not necessary to prove a defect for a violation of Section 2 of the SAA to occur. Congress, in the automatic coupler provision, wanted one result—to obviate the necessity of persons going between cars. H.R. Rep. 1678, 52nd Cong. 1st Sess. 3 (1892). There is not one word in the hearings, the Congressional reports, nor the Congressional floor debate to the effect that the coupler must be defective before a violation exists. The Petitioner undertakes a selective analysis into the legislative history in which it ignores the central policy expressed throughout the SAA—to protect the worker.

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[5] The Senate hearings were annexed as part of the Senate Report. Therefore, in referring to the Senate hearings, the Senate Report will be cited *infra*.

[6] For obvious reasons the Petitioner seeks to have the Court impose a restrictive reading upon the statute in question. (Pet. Br. 11-12, 14). It argues that the statutory language should be limited to the actual moment that the coupling or uncoupling occurs, and thereby exclude the process of adjusting a misaligned drawbar so that the coupling could actually occur. (Pet. Br. 11-12). Respondent submits that if Congress had intended to limit § 2 to moving equipment, it would have specifically inserted the word in 1893 upon passage or in 1994 the most recent codification of the SAA.

Congress was certainly cognizant of the problem and wanted to eliminate the possibility of casualties resulting from persons placing themselves between ends of cars. The following exchange in the Senate hearings between the author of the bill, which in part became 45 U.S.C. § 2, and the Chairman of the Senate Interstate Commerce Committee illustrates this concern:

> The CHAIRMAN. Suppose your bill, Senate bill 1618, were passed and becomes a law. Will there be, under any circumstances, any necessity for a switchman *to go between the cars at all* in order to couple or uncouple the cars?
>
> Mr. RODGERS. . . . The law provides that there shall not be. They have to adopt a coupler with such details that it will not.
>
> . . . .
>
> The CHAIRMAN. Now, if the technical provisions of that law are preserved, the railroads in all cases will be required to provide such a coupler as will obviate the necessity of the switchman going between the cars?
>
> Mr. RODGERS. They will; that is in special phraseology:
>
> Shall be equipped with automatic couplers so constructed as to couple by impact with the next car without the necessity of a person going between the cars, and so constructed as to be uncoupled without the necessity of a person going between the cars.
>
> . . . . There is a number of devices that enable this uncoupling to take place from the *side of the car* and it is better that it should be. (Emphasis Added).

S. Rep. No. 1049, *supra* at 14.

Congress was concerned about the hazards of going between the ends of the cars to effect coupling or uncoupling, even with the already-in-use automatic coupling systems. Even the industry spokesperson acknowledged that the intent of the legislation was to protect the worker

from personal injury. *Id.* at 40. The interpretation in recent years by the railroads, and in this litigation, is different from what the industry represented to Congress.

Mr. H. S. Haines, Vice-president of the American Railway Association (predecessor to the Association of American Railroads) stated the issue succinctly in testimony during the 1892 hearings:

> I understand the tendency of the legislation to be of a most laudable character and one in which we are entirely in accord, and that is that this committee desires to consider the proposed bills before them with reference to the safety of the men who use these couplers. That is the aspect of the case to which I propose to refer—the possibilities of legislation. *It is not a question as to whether we should have a uniform coupler or not. The question is whether we shall have that kind of a coupler which will protect men's lives and protect them from personal injury, and that is the yardstick that is to be applied to all proposed legislation.*

Id. (Emphasis Added).

As Mr. H. S. Haines further testified:

> What we all want . . . and what this committee wants is a coupler which can be used without danger to the life or to the limb of the man who manipulated it.
>
> . . . .
>
> What the man who manipulates the coupler wants is that every coupler, shall have what we call the release rod, that controls the locking device, so arranged that he can stand *outside* of that car and operate it.

Id. at 41. (Emphasis Added).

The Senate floor debate adds further clarification:

> A railroad employee . . . is asked to step inside the track, stand up against a car which is not moving,

> and watch the coming of another car, which is being pushed steadily up against the car near which he stands. . . . I doubt whether there is a Senator here who can stand deliberately and see a long train coupled in the way the coupling is now done without turning his eyes away as two cars come together just before it is the duty of the car-coupler to make the connection and then get out of the way . . . *This bill does not require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between the cars.*

24 Cong. Rec. 1280 (1893). (Emphasis Added).

The couplers today are engineered significantly better than existed in 1893 when the SAA was enacted. Congress at the time was interested in eradicating the loss of life and injuries resulting from couplers failing to couple automatically for any reason. This is the only way employees would be fully protected and certainly what Congress intended. To carve out an exception to the protection of employees 102 years later we submit would be unconscionable.

The railroad argues that all activities of a person going between cars is not prohibited by the SAA. (Pet. Br. 12, 14-17). For example, employees may go between the cars and make air connections. (Pet. Br. 14-15). The Petitioner fails to recognize that the air hose connection may be performed only after the coupling of the cars has occurred. There is no risk of train movements after the coupling occurs, and therefore it is safe and not prohibited for the employee to go between the cars to couple the air hoses. Also, the inspection of cars by employees, other than train or yard crews, may occur only while there is protection against any movement of a car. See 49 U.S.C. § 20131 and 49 C.F.R. Part 218, Subpart B. Moreover, it is immaterial that there exist situations whereby employees go between cars pursuant to other sections of the

various railroad safety laws. The issue here is solely whether or not an employee may go between cars for purposes of the process of coupling and uncoupling. The answer clearly is no, irrespective of what an employee may do in other types of railroad operations. The railroad states that unless the Federal Railroad Administration's regulations are invalid, the SAA does not bar the operation of going between the cars. (Pet. Br. 17). That, of course, begs the question whether or not the referred to regulations violate the SAA. That issue is not before the Court in this case. The Respondent is unaware of any court decision, other than *United Transportation Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983), which analyzed the legality of a procedure authorized by the Federal Railroad Administration whereby an employee was required to place at least part of his body between the cars. It involved the use of a hook by an employee standing outside the ends of cars to open knuckles. It was noted there that the device markedly reduced the need for manual alignments after failed couplings. In that case the court recognized that the FRA regulation may not be violated, but an action could still lie for injuries sustained in performing the manual preparation, because the cars failed to couple automatically. *Id.* at 236 fn. 6. Therefore, as reasoned in *Lewis*, a violation of the SAA does not necessarily mean that a FRA regulation issued pursuant to the SAA is violated.

In the *Lewis* case, 711 F.2d at 245-248, the panel, in which Justice Ginsburg was a member, provided a detailed analysis of the legislative history. It concluded that there was nothing in the legislative history which might demonstrate that Congress also intended to regulate operating procedures or make it unlawful for men to go between cars. *Id.* at 247. Further, the panel focused on the House Report which stated:

> It is the judgment of this committee that all cars and locomotives should be equipped with automatic

> couplers, obviating the necessity of men going between the cars . . .

H.R. Rep. No. 1678, *supra* at 3.

That court reasoned that *obviating the necessity* can only modify the kind of couplers with which cars and locomotives shall be equipped. 711 F.2d at 248. Even the court in *Lewis* acknowledged that the intent of Congress was to prevent the need for men to go entirely between the tracks in order to effect a coupling or uncoupling. *Id.* at 243 fn. 28.

That decision turned on whether the statement *without the necessity of men going between the ends of the car* was descriptive of the equipment, or whether § 2 contained an independent prohibition of the act of going between the cars. The court held that it was descriptive of the equipment and does not address operating procedures. *Id.* at 245. Nevertheless, the court stated that:

> While an action [would lie] for any injuries sustained in performing the manual preparation, because cars have failed to couple automatically, . . . this does not make the coupler "defective" within the meaning of FRA *regulations* . . .

Id. at 236 fn. 6.

Also, the court said that, although there is no separate prohibition for the act of going between the cars, the railroad is still liable because if the employee must go between the cars to effect a coupling, then there has been a "failure to provide equipment that functions as the statute commands". *Id.* at 251. The court further clarified the above statement in footnote 39 at p. 251 as follows:

> . . . .
>
> At the same time, however, *actual failure* to couple automatically because of a misaligned drawbar or a closed coupler is sufficient to establish liability under Section 2. See *Metcalfe v. Atchison, Topeka &*

> *Santa Fe Ry., supra,* 491 F.2d at 896 and cases cited therein. This is because Congress imposed on railroads a duty not just to provide proper equipment, but also to *guarantee its performance.* See *Affolder v. New York, Chicago & St. Louis R.R.,* 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950); *Carter v. Atlanta & St. Andrews Bay R.R.,* 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236 (1949); *Delk v. St. Louis & San Francisco Ry.,* 220 U.S. 580, 31 S.Ct. 617, 55 L.Ed. 590 (1911). And FRA continues to adhere to this view of the railroad's responsibility. . . .[7]

III. THE COURT'S ANALYSIS OF THE SAA CONFIRMS THAT IT IS NOT NECESSARY TO PROVE A DEFECT EXISTS IN THE COUPLER TO ESTABLISH A VIOLATION

The Court has reviewed § 2 of the SAA a limited number of times. In each case it upheld the basic purpose of the Act, to protect an employee from having to go between cars to assist in coupling or uncoupling. Section 2 merely describes the type of coupler which must be used. That is one which performs in such a way that it can be coupled and uncoupled without the necessity of persons going between the cars. As stated by this Court on several occasions, the *condition* of the equipment is not the issue. Rather, it is whether the couplers *performed* as required by the SAA.

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[7] The Petitioner's reliance on the FRA's rulemakings which were not issued pursuant to the Safety Appliance Acts is misplaced. (See Pet. Br. 15-17). The fact that a railroad complies with one FRA regulation does not automatically mean that the railroad has complied with a Federal statute covering a different subject matter. The FRA regulations referred to by the railroad were promulgated pursuant to the Federal Railroad Safety Act, not the SAA. (See 48 Fed. Reg. 45272, 45274 (1983); 49 Fed. Reg. 6495, 6497 (1984); and 58 Fed. Reg. 43287, 43292 (1993), where the FRA cites its authority for issuing the regulations).

The two concepts which emerge from the Court's analysis of § 2 of the SAA are:

1. If the equipment failed to perform as required by the statute, this in and of itself is an actionable wrong.

2. Section 2 mandates that the couplers *perform* as required, and the *condition* of the coupler is irrelevant in determining whether a violation has occurred. Any requirement that a coupler must be properly set as a precondition to liability recognizes that such an act can be accomplished outside the cars without the necessity of a person going between them.

In *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. at 99, the Court held that a car which failed to perform properly in a switching operation was a violation of the Act. The only way a carrier could avoid liability is if the coupler had not been properly opened. *Id.* The Court pointed out that the plaintiff did not have to show a bad condition of the coupler. *Id.* at 98. It said:

> In [*O'Donnell v. Elgin, Joliet & Eastern R. Co.*,] we held that the Plaintiff did not have to show a "bad" condition of the coupler; she was entitled to a peremptory instruction that to equip a car with a coupler which failed to perform properly "in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and neither evidence of negligence nor of diligence and care was to be considered on the question of this liability." Further, we said, "a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong . . ." *Id* at 99.

The Petitioner relies on both *Atlantic City R.R. v. Parker*, 242 U.S. 56 (1916) and *San Antonio & A.P.R.R. v. Wagner*, 241 U.S. 476, to argue that, before there can

be a violation of the SAA, the railroad should be allowed to prove the drawbar was not defective and/or not properly adjusted by the crew and, furthermore, it is a jury question. (Pet. Br. 19-20).[8]

The *Wagner* case does not support the railroad's contention. In *Wagner* the employee was standing upon the foot board of an engine, between the engine and car, and was attempting to shove the knuckle of the engine's coupler so as to bring it into proper position to make the coupling. He lost his balance, slipped and fell, and his left foot was caught between the couplers and crushed. The railroad argued that cars must have sufficient lateral motion to permit trains to negotiate curves, and that no coupler will couple automatically at all times without previous adjustment, because of the lateral play necessary to enable coupled cars to round curves. The Court held that the jury could reasonably find that the misalignment of the drawbar was greater than required to permit the rounding of curves, or, if not, that an adjusting lever should have been provided.[9]

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[8] It is significant to note that the strategy of the railroad in this Court is different from its arguments presented below. In the lower courts the railroad argued that the injured employee must show a defect or bad condition in order for a misalignment to violate the SAA. (See Brief and Appendix of Defendant Norfolk and Western Railway Company in the Appellate Court of Illinois, Fifth Judicial District at pp. 13-14.). Here, the Petitioner is now stating that it should be allowed to present a defense that its equipment was non defective and not set properly.

[9] Regarding Petitioner's argument that whether or not a violation exists is a jury question, obviously depends upon whether or not there were sufficient facts for a jury to consider. In this case, the Petitioner only offered testimony that the equipment was not defective upon examination after the accident. The fact that an appliance worked efficiently both before and after the occasion in question is irrelevant. See *Myers v. Reading Co.*, 331 U.S. 477, 483 (1947). Furthermore, in its offer of proof it did not assert, and indeed it could not, that the equipment was improperly set by the plaintiff.

In *Parker* an employee was injured while reaching in to straighten a drawbar. There, the railroad's primary defense was that the SAA did not apply to a coupling made on a curve because no device existed which could align the drawbar from outside the car. The railroad further contended that there needs to be a showing of a defect in the equipment or of negligence on its part before there can be liability under the SAA. The Court specifically addressed both points and concluded that, if the couplers do not couple automatically by impact, nothing else needs to be considered.

> If there was evidence that the railroad failed to furnish such "couplers coupling automatically by impact" as the statute requires (*Johnson v. Southern Pacific Co.*, 196 U.S., 1, 18, 19), nothing else needs to be considered. We are of opinion that there was enough evidence to go to the jury upon that point. No doubt there are arguments that the jury should have decided the other way. Some lateral play must be allowed to drawheads, and further, the car was on a curve, which of course would tend to throw the coupler out of line. But the jury were warranted in finding that the curve was so slight as not to affect the case and in regarding the track as for this purpose a straight line. If couplers failed to couple automatically upon a straight track it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law *Chicago, Burlington & Quincy Railroad Co. v. United States*, 220 U.S. 559, 571. *Chicago, Rock Island & Pacific Ry. Co. v. Brown*, 229 U.S. 317, 320, 321. *San Antonio & Arkansas Pass Ry. Co. v. Wagner*, 241 U.S. 476, 484.

Id. at 59.

Moreover, in *Parker* the facts indicate that the attempted coupling was made on a curve.[10] Both *Parker* and *Wagner* were decided on the ground that the failure of the coupler to work sustains the claim for negligence and/or negligence *per se*. "If this Act is violated, the question of negligence in the general sense of want of care is immaterial." *Parker*, 241 U.S. at 484.

The Court, in its 1949-1950 decisions, noted that there may be possible confusion from the earlier cases. In *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430, 433-434 (1949), the Court held that the absence of a defect cannot aid the railroad if the coupler was properly set and failed to couple. The railroad argued that a coupler which did not function properly should not violate the SAA because the plaintiff had not demonstrated that a defect existed in the coupler. The Court said:

> This Court has repeatedly attempted to make clear that this is an absolute duty not based upon negligence, and that the *absence of a 'defect' cannot aid the railroad* if the coupler was properly set and failed to couple on the occasion in question. (Emphasis Added).

Regarding proof of negligence, in *O'Donnell* the Court stated:

> The arguments and instruction in this case, as well as others, in the language of many opinions and texts reflect widespread confusion as to the effect to be accorded a violation of the Federal Safety statute. [citing *Wagner*]. Part of this confusion is traceable to the diversity of judicial opinion concerning the

[10] Here, the Petitioner, in an offer of proof, proffered testimony only that the car in question was pulled on a curve or slope. (J.A. 24). That testimony did not state what the attorney for Petitioner represented to the judge. The Petitioner has concluded from this that the uncoupling "must have taken place on a curve." (Pet. Br. 6).

> consequences attributed in negligence actions to the violation of a statute.

338 U.S. at 389.

In O'Donnell, 338 U.S. at 393, the Court said that evidence of defect added nothing to a claim under SAA, because it was the failure of the equipment to perform as Congress mandated which was violative of the Act.

> For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence [Citations omitted]. . . . The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous. *Brady v. Terminal Railroad Ass'n of St. Louis,* 303 U.S. 10, 15.

Id. at 390-391.

The Petitioner argues that it need not develop technology to align drawbars automatically (Pet. Br. 22-23). The Court addressed this point in *O'Donnell* and said:

> But the Act certainly requires equipment that will withstand the stress and strain of all ordinary operations, grade, loadings, stops and starts, including emergency stops. A defendant cannot escape liability for a coupler's inadequacy by showing that too much was demanded of it, nor by showing that while the coupler broke it had been properly manufactured, diligently inspected and showed no visible defect. These circumstances do go to the question of negligence; but, even if a railroad should explain away its negligence, that is not enough to explain the way its liability if it has violated the Act.[11]

[11] This Court noted 338 U.S. at 391 fn. 7, that there are circumstances in which a railroad may defend against a failed coupler because of an intervening and independent cause other than its inadequacies or defectiveness. It gave examples of the work of a saboteur, or where a coupler failed to hold because it was improperly set. The Court discussed the latter situation in *Affolder,* 339 U.S. at 96, and it also follows from the reasoning in the above quoted portion in *O'Donnell* that the condition of couplers in ordinary operations, such as curves, grades, loadings, etc. are not defenses to a violation of § 2 of the SAA.

Id. at 393-394; See also *Affolder,* 339 U.S. at 95-96; *Carter,* 338 U.S. at 433-434.

In addition to *O'Donnell,* the Court in both *Carter* and *Affolder* eliminated all requirements of negligence or fault in establishing a violation of the SAA. These cases recognize that negligence would be improperly introduced into the cases if the railroad could defend against a violation of the SAA by evidence of alleged reasons why the coupling would not occur in a particular set of circumstances.

In *Johnson v. Southern Pacific R.R.,* 196 U.S. 1 (1904), a plaintiff in the process of straightening a drawbar, was injured because the couplers on the two cars to be joined were not compatible with one another. The Court noted:

> The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.

Id. at 16-17.

. . . .

> The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically.

Id. at 19.

. . . .

> The essential degree of uniformity was secured by providing that the couplings must couple automatically by impact without the necessity of men going between the ends of the cars.

Id. at 20.

The Petitioner, in its brief, at 21-24 contends that the misalignment in the present case was caused by the normal movement of the railroad car and not by any defect or malfunctioning of the equipment. It offers various reasons why a misaligned drawbar occurs in cases where the equipment is not defective. For example, it states that drawbars often become misaligned by normal jarring and vibrations, the drawbars traversing a curved track must have some lateral play, and that the proper alignment can only be accomplished by the employee going between the rails to move the drawbar manually. (Pet. Br. 22). The Petitioner argues that since the above is the result of normal train operations, this should not make a misalignment a violation of the SAA. The railroad contends that it should not be required to develop new technology to keep the drawbars in proper alignment. We submit this is completely inconsistent with the language of the statute, the intent of Congress, and decisions of the Court. Congress did not concern itself with how the railroads would comply with the statutory requirement, but only that the employees be protected in the coupling and uncoupling operations.[12] An employee can

[12] As stated by the report of the House Committee on Interstate and Foreign Commerce "The demand of railway employees for the protection of the law came to us with great force as we recognized that they could not to any great extent guard against the casualties to which they were exposed; *they must face the danger while others determined the conditions under which they labor.*" H.R. Rep. 1678 *supra* at p. 2. (Emphasis added). Congress intended to, and did, eliminate the hazardous burden placed upon the employes in coupling and uncoupling operations by the adoption of Section 2.

open a knuckle without going between cars, but he/she cannot align a drawbar without doing so. It was appropriate for the Court in *Affolder* to conclude that liability under the SAA existed so long as the coupler was placed in a position to operate, because the equipment permits the uncoupling to occur by use of an uncoupling lever without the necessity of an employee going between the cars. From the railroad's argument here, it appears that the railroad is suggesting that an uncoupling lever was not necessary. We submit that the Court would not have imposed the condition that the coupler be placed in an open position if the device were not present to prevent the employee from going between the cars. The industry had an obligation to develop a mechanism for automatic realignment of a drawbar, or railroads assume the risk that if an employee is injured in the process of attempting to manually realign the equipment, the SAA would be violated.[13]

[13] The Respondent agrees with the statement of the Petitioner (Pet. Br. 24-25) that it should not make a difference as to the railroad's liability whether or not first there must be a failed attempt to couple, rather than relying on the judgment of an employee that the drawbar is too slued to couple, and then the employee is injured during the process of alignment in each instance. In the former example, the requirement to first make an attempt at a coupling and fail would be a useless act, and could in fact damage equipment. It should be noted that in the lower court, the Petitioner argued that a failed coupling or impact must first occur before the SAA is violated. See Brief and Appendix of Defendant Norfolk and Western Railway Company in the Appellate Court of Illinois, Fifth Judicial District at pp. 16-17.

CONCLUSION

For all the reasons stated herein, the decision of the judgment of the Appellate Court of Illinois should be affirmed.

Respectfully submitted,

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